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September 10, 2013

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Ave. SW
Washington, DC 20201

Dear Secretary Sebelius:

Public Citizen is a strong supporter of the National Practitioner Data Bank (Data Bank) of the Department of Health and Human Services (HHS). We believe the Data Bank plays a central role in ensuring patient safety by providing the most comprehensive, reliable information concerning the malpractice and medical disciplinary records of physicians and other practitioners to licensing boards, credentialing authorities, peer reviewers, and other users.

We are writing to express serious concern that a law recently enacted by the state of Oregon threatens the viability of the Data Bank as a comprehensive and reliable source of data regarding malpractice payouts, particularly if other states follow Oregon's lead. The Oregon law seeks to create a loophole that would allow physicians to avoid reporting to the Data Bank any malpractice payments that are negotiated through a mediation process specified under the new law. Such state-level efforts to facilitate malpractice settlements by increasing secrecy and preventing reporting to the Data Bank of medical malpractice payments made on behalf of practitioners must not be permitted. We strongly urge HHS to take prompt action clarifying that all such payments must be reported to the Data Bank under federal law.

Background on the Data Bank and Importance of Reporting Malpractice Payments

The Data Bank was authorized by the Health Care Quality Improvement Act of 1986 (HCQIA) and began operation on September 1, 1990, after publication of regulations and creation of the Data Bank's computer system.

The Data Bank is recognized as the gold standard for malpractice and medical disciplinary information, providing important background-check information on doctors and other health care providers to hospitals, medical boards, health maintenance organizations, and other authorized users. Based on the findings of a 2001 HHS-funded survey of Data Bank users, we estimate that at least 50,000 licensure, credentialing, or membership decisions by these entities in 2012 were affected by new information provided by the Data Bank's responses to queries.

We recognize that a single malpractice payment is not necessarily a good indicator of the quality of care provided by a physician or other practitioner. Yet research has shown that a pattern of malpractice payments is an excellent indicator of which physicians have quality-of-care problems and may need retraining, proctoring, or some other serious action to ensure the safety of their future patients. If the reporting of malpractice payments to the Data Bank is hindered by state efforts to provide a legal basis to avoid reporting, it will become more difficult, if not impossible, for Data Bank users to identify such patterns of malpractice by a practitioner.

Oregon Legislation Threatens Data Bank Comprehensiveness

The state of Oregon recently adopted legislation (77th Oregon Legislative Assembly — 2013 Regular Session, SB 483: “Resolution of Adverse Health Care Incidents”) seeking to facilitate malpractice settlements by allowing physicians to initiate a mediation process if they believe they have committed malpractice. If the injured patient agrees (or his or her survivors agree) to a mediated payment, the new Oregon law specifically says that the payment was not made in response to a written demand for payment. Since the *NPDB Guidebook* provides that only payments made in response to a written demand for a payment are reportable, these malpractice payments would not be reportable to the Data Bank. In fact, the provision in the new Oregon law was explicitly written to create a loophole so practitioners could make payments that would not be reported to the Data Bank, as language in the original draft of the law stated.

The Oregon law undermines the usefulness of the Data Bank nationally because it allows physicians with mediated malpractice payments to move from Oregon to other states without such payments being discovered. Moreover, some are proposing this Oregon legislation as a model for other states. If other states adopt the same legislation, the problem will be compounded, and the Data Bank will be severely compromised.

We believe that the intent of the federal HCQIA must prevail over this new loophole created by Oregon state law and facilitated by the *NPDB Guidebook* language. It should be explicitly stated by HHS that for federal reporting purposes, any agreement to proceed with malpractice mediation constitutes a written demand for payment by the claimant, regardless of any contrary wording in state law. In addition, HHS should revise the *NPDB Guidebook* to eliminate the requirement that a written demand for payment must be made for a payment to be reportable.

To ensure patient safety, HHS should promptly act to eliminate this threat to the Data Bank’s integrity and its continued usefulness. The Data Bank protects lives, prevents injuries, and saves valuable health care dollars. HHS must act now to maintain its vital contribution to our health care system; the stakes are too high to do otherwise.

We would appreciate being advised of your decision regarding an HHS effort to address this loophole.

Sincerely,

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cc: Mary K. Wakefield, Ph.D., R.N., Administrator, Health Resources and Services Administration